

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
NATURAL RESOURCES DEFENSE COUNCIL, INC.,	:
	:
Plaintiff,	:
	:
- v. -	:
	:
UNITED STATES DEPARTMENT OF ENERGY and	:
UNITED STATES DEPARTMENT OF THE	:
AIR FORCE,	:
	:
Defendants.	:
-----X	

No. 09 Civ. 1334 (SAS)

ECF Case

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTORY STATEMENT

1. This case challenges the United States Department of Energy's ("DOE") and the United States Department of the Air Force's ("USAF"), refusal to disclose records concerning a coal-to-liquid facility proposed for Wellsville, Ohio by Baard Energy, also known as Ohio River Clean Fuels, LLC (the "Baard Energy CTL Facility" or the "Facility"), in violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

2. The proposed \$5.5 billion Baard Energy CTL Facility would employ a technology never before used in the United States to convert coal into diesel fuel, naphtha (a highly volatile and flammable liquid that is used in solvents and various petrochemical industrial processes), and electricity. In order to make construction of the Facility economically feasible, Baard Energy is seeking significant taxpayer subsidies, including a \$2.3 billion loan guarantee from DOE and long-term fuel purchase contracts from USAF.

3. If constructed, the Baard Energy CTL Facility would account annually for the emission of more than 26 million tons of carbon dioxide (“CO₂”), a greenhouse gas that contributes to global warming and its severe ecological disruptions. The plant would also emit substantial amounts of fine particulate matter and other conventional and hazardous air pollutants that endanger human health. In addition, operation of the Facility would require the combustion of approximately 9.3 million tons of coal every year, the mining and transport of which has numerous deleterious effects on the environment.

4. On October 31, 2008, plaintiff Natural Resources Defense Council, Inc., a non-profit environmental organization, submitted FOIA requests to both DOE and USAF, seeking records relating to the Baard Energy CTL Facility.

5. Both DOE and USAF have failed to provide any records in response to NRDC’s FOIA requests, and both DOE and USAF have otherwise failed to provide NRDC with a determination of its requests.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action, and venue is proper in this district, pursuant to 5 U.S.C. § 552(a)(4)(B), in that NRDC maintains its principal place of business in this district.

PARTIES

7. Plaintiff NRDC is a national, not-for-profit membership corporation with its principal place of business in New York, New York. NRDC has more than 420,000 members nationwide, including over 12,000 members who live in Ohio, 4,500 of whom live in Columbiana, Jefferson, and surrounding counties adjacent to the Facility’s planned location. NRDC’s membership and staff of lawyers, scientists, and other environmental specialists have a

longstanding interest in working to address threats to human health and the environment posed by air and water pollution and global warming, and have been involved for decades in advocacy for cleaner, more sustainable forms of energy, including opposing the construction, operation, and modification of facilities that would result in major new sources of global warming emissions and other forms of air pollution.

8. NRDC routinely uses FOIA to obtain information from federal agencies, which NRDC's legal and scientific experts analyze in order to inform NRDC's members and the public about a variety of issues including energy policy, urban air pollution, pesticide regulation, climate change, endangered species, drinking water quality, and nuclear weapons. NRDC regularly conveys important information obtained through FOIA, to its members and the public by way of publications and press releases, its web site, as well as by releasing to the public documents obtained through FOIA requests.

9. NRDC brings this action on its own behalf and on behalf of its members. NRDC and its members have been and continue to be injured by DOE's and USAF's failure to provide responsive records. The requested relief will redress these injuries.

10. Defendant DOE is a federal agency within the meaning of FOIA and has possession or control of records that NRDC seeks in this action.

11. Defendant USAF is a federal agency within the meaning of FOIA and has possession or control of records that NRDC seeks in this action.

STATUTORY FRAMEWORK

12. Enacted in 1966, the Freedom of Information Act was designed to "encourage public disclosure of information" in order to "ensure an informed citizenry." American Civil Liberties Union v. Department of Defense, 543 F.3d 59, 66 (2d Cir. 2008) (citations omitted).

To this end, FOIA requires agencies of the federal government to release, upon request, information to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(a)(3)(A). These exemptions are narrowly construed, and the agency bears the burden of establishing the applicability of each exemption as to each document for which it is claimed.

13. Upon receiving a FOIA request, an agency has twenty working days to respond by determining whether responsive documents exist and whether the agency will release them. 5 U.S.C. § 552(a)(6)(A). If the agency denies the FOIA request, the requester is entitled to appeal the determination within thirty days. FOIA requires the agency to make a determination with respect to an appeal within twenty working days. 5 U.S.C. § 552(a)(6)(A)(ii).

14. FOIA does not permit an agency to delay an initial response or an appeal determination for longer than ten working days past the statutory deadline, and then only if the agency can demonstrate that it faces “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B). “Unusual circumstances” include the need to search for and collect requested documents from other offices, the need to appropriately examine a voluminous amount of separate and distinct records, and the need to consult with another agency. 5 U.S.C. § 552(a)(6)(B)(iii)(I-III).

15. A requester is entitled to a waiver of fees associated with responding to a FOIA request when the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

16. When an agency denies, in whole or in part, a request for records under FOIA, the agency must make a “reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request.” 5 U.S.C. § 552(a)(6)(F).

17. FOIA expressly provides that a requester “shall be deemed to have exhausted his administrative remedies . . . if the agency fails to comply with the applicable time limit provisions” governing its response to a FOIA request or an appeal. 5 U.S.C. § 552(a)(6)(C).

STATEMENT OF FACTS

A. The Proposed Baard Energy CTL Facility

18. Baard Energy intends to construct a \$5.5 billion coal-to-liquid fuel plant near the banks of the Ohio River in Wellsville, Ohio. The Facility would produce 53,000 barrels of liquid fuel (including diesel, naptha, and liquid propane gas) and generate approximately 250 megawatts of electric power per day. The Baard Energy CTL would be fueled by 9.3 million tons of coal annually, which Baard Energy has stated is likely to consist of Northern Appalachian Eastern Bituminous coal, mined within close proximity to the plant.

19. The process of transforming coal into liquid fuels is controversial and generates hazardous environmental impacts, including the release of significant quantities of global warming and other air pollutants. Currently, there are no coal-to-liquid plants in the United States.

20. Each year, the Baard Energy CTL Facility would emit at least 12.4 million tons of CO₂ into the atmosphere. In addition, the use of the fuel produced by the Facility will emit up to another 14.19 million tons of CO₂ annually, making the Facility’s total annual carbon footprint as much as 26.59 million tons. While Baard Energy has talked publicly about reducing its carbon footprint by using technology such as carbon capture and sequestration or by using biomass (plant matter and other biological material that can be used as a source of fuel for electricity production or industrial processes) rather than coal for some of the feedstock for the Facility, Baard refuses to commit to and is not bound to take either of these steps.

21. CO₂ emissions contribute to global warming and thus to a wide range of related adverse ecological, human health, and economic effects, including water shortages and coastal flooding, increased risk of extreme weather events such as wildfires and stronger hurricanes, new pests and insect-borne diseases, air quality effects, agricultural effects, drought, disruption of habitats, and population displacement.

22. In addition to emitting millions of tons of CO₂, the Facility will emit fine particulate matter, known as PM_{2.5}, and other conventional and hazardous pollutants, such as sulfur dioxide, nitrogen oxide, hydrogen sulfide, volatile organic compounds, and mercury. These pollutants can cause eye, nose, and throat irritation, shortness of breath, aggravation of respiratory conditions such as asthma and bronchitis, increased susceptibility to respiratory infections, neurological impairment, developmental disorders, heart attacks, and premature death in people with heart and lung disease, among other harms.

23. The mining of the 9.3 million tons of coal needed to fuel the Facility every year can have significant adverse environmental impacts. Coal mining destroys natural habitats, pollutes rivers and streams, releases substantial amounts of methane (which contributes to global warming), and can threaten homes and businesses due to mine collapse. In particular, coal mined from Northern Appalachia is often extracted through a process known as “mountain top removal,” in which mining companies literally blow up entire mountain tops and dump the leftover rubble (or “spoil”) into mountain valleys and streams, creating so-called “valley fills.” In addition to spoil, this mining process generates massive quantities of coal slurry wastes that are typically disposed of in “impoundments” (a euphemism for huge, stagnant settling ponds of contaminated water).

24. In an effort to make the Facility economically feasible, Baard Energy has applied to DOE for a \$2.3 billion loan guarantee from DOE's "Federal Loan Guarantees for Coal-Based Power Generation and Industrial Gasification Facilities That Incorporate Carbon Capture and Sequestration or Other Beneficial Uses of Carbon and for Advanced Coal Gasification Facilities" program (Solicitation Number: DE-FOA-0000008).

25. On information and belief, Baard Energy is also seeking to have the USAF enter into a long-term contract to purchase diesel fuel that would be produced by the Baard Energy CTL Facility.

B. NRDC's FOIA Request to DOE

26. On October 31, 2008, NRDC submitted a FOIA request to DOE requesting all records in the possession or control of DOE regarding the following categories of information: (a) any application by Baard Energy for DOE loan guarantees or other DOE subsidies; (b) any evaluation by DOE of the Facility as a possible recipient of DOE loan guarantees or other DOE subsidies; (c) any communications between Baard Energy and DOE regarding possible DOE loan guarantees or DOE subsidies for the Facility; and (d) any communications between the Ohio Department of Development, the Ohio Air Quality Development Authority, or the Columbiana County Port Authority and the DOE regarding possible DOE guarantees or DOE subsidies for the Facility.

27. NRDC's October 31, 2008 FOIA request to DOE defined the term "records" to "mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence,

minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders, and filings.”

28. NRDC’s October 31, 2008, FOIA request to DOE also included a request that DOE waive the fee that it would otherwise charge to search for and produce responsive records. NRDC claimed entitlement to a fee waiver pursuant to FOIA because “disclosure of the information is in the public interest[,] because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest” of NRDC. 5 U.S.C. § 552(a)(4)(A)(ii)(II). NRDC provided DOE with material substantiating its entitlement to a fee waiver for its request.

C. DOE’s Failure to Provide an Adequate Response to NRDC’s FOIA Request

29. On November 3, 2008, DOE sent a letter to NRDC, notifying NRDC that it had received NRDC’s FOIA request and assigned it the control number FOIA-2008-000651.

30. Under FOIA and DOE regulations, DOE was obligated to provide a response determination on NRDC’s October 31, 2008 FOIA request on or before December 2, 2008.

31. To date, other than the letter acknowledging receipt, DOE has not responded in writing to NRDC’s October 31, 2008 FOIA request. DOE has not informed NRDC of the number of documents in DOE’s possession that are responsive to NRDC’s October 31, 2008 FOIA request. DOE has not produced any documents nor asserted that any documents are being withheld under one of the FOIA exemptions. DOE has not responded to NRDC’s request for a fee waiver.

32. Since December 2, 2008, NRDC has contacted the DOE representatives named in DOE’s November 3, 2008 letter by telephone regarding its October 31, 2008 FOIA request.

DOE representatives were unable to provide NRDC with a date by which DOE would provide a response determination to NRDC's request.

D. NRDC's FOIA Request to USAF

33. On October 31, 2008, NRDC submitted a FOIA request to USAF, requesting all records in the possession or control of USAF regarding the following categories of information: (a) any proposal by Baard Energy for the United States Department of Defense or one of its components (which includes, but is not limited to, USAF) to enter into a contract for the purchase of fuel that would be generated by the Facility; (b) any evaluation by DOD of the Facility as a possible source of fuel; (c) any communications between Baard Energy and DOD regarding the possibility of DOD purchasing fuel that would be generated by the Facility; and (d) any communications between the Ohio Department of Development, the Ohio Air Quality Development Authority, or the Columbiana County Port Authority and the DOD regarding possible DOD purchases of fuel that would be generated by the Facility.

34. NRDC's October 31, 2008 FOIA request to USAF defined the term "records" to "mean anything denoted by the use of that word or its singular form in the text of FOIA. In particular, the term includes, but is not limited to, all writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored) including, but not limited to, correspondence, minutes of meetings, memoranda, notes, e-mails, notices, facsimiles, charts, tables, presentations, orders, and filings."

35. NRDC's October 31, 2008 FOIA request to USAF also included a request that USAF waive the fee that it would otherwise charge to search for and produce responsive records. NRDC claimed entitlement to a fee waiver pursuant to FOIA because "disclosure of the information is in the public interest[,] because it is likely to contribute significantly to public

understanding of the operations or activities of the government and is not primarily in the commercial interest” of NRDC. 5 U.S.C. § 552(a)(4)(A)(ii)(II). NRDC provided USAF with material substantiating its entitlement to a fee waiver for its request.

E. USAF’s Failure to Provide an Adequate Response to NRDC’s FOIA Request

36. On November 6, 2008, USAF sent a letter to NRDC, notifying NRDC that it had received NRDC’s FOIA request and assigned it the control number 09-0099.

37. Under FOIA and USAF regulations, USAF was obligated to respond to NRDC’s October 31, 2008 FOIA request on or before December 2, 2008.

38. On December 15, 2008, USAF sent a letter to NRDC, stating that USAF was still processing NRDC’s October 31, 2008 FOIA request.

39. Since the December 15, 2008 letter, USAF has not responded in writing to NRDC’s October 31, 2008 FOIA request. USAF has not informed NRDC of the number of documents in USAF’s possession that are responsive to NRDC’s October 31, 2008 FOIA request. USAF has not produced any documents nor asserted that any documents are being withheld under one of the FOIA exemptions. USAF has not responded to NRDC’s request for a fee waiver.

40. Since December 2, 2008, NRDC has contacted the USAF representative named in USAF’s November 6, 2008 and December 15, 2008 letters by telephone regarding its October 31, 2008 FOIA request. The USAF representative did not respond to NRDC’s telephone inquiries.

CLAIMS FOR RELIEF

First Claim for Relief (NRDC FOIA Request to DOE)

41. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint as if fully set forth herein.

42. By failing to provide all records responsive to NRDC's October 31, 2008 FOIA request, DOE has violated FOIA's mandate to release agency records to the public. 5 U.S.C. § 552(a)(6).

43. Under FOIA, DOE is required to grant NRDC's request for a fee waiver with respect to its October 31, 2008 FOIA request, because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

44. NRDC is entitled to obtain the requested records immediately at no cost.

Second Claim for Relief (NRDC FOIA Request to USAF)

45. Plaintiffs reallege and incorporate the allegations of all the preceding paragraphs of this Complaint as if fully set forth herein.

46. By failing to provide all records responsive to NRDC's October 31, 2008 FOIA request, USAF has violated FOIA's mandate to release agency records to the public. 5 U.S.C. § 552(a)(6).

47. Under FOIA, USAF is required to grant NRDC's request for a fee waiver with respect to its October 31, 2008 FOIA request, because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

48. NRDC is entitled to obtain the requested records immediately at no cost.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter a judgment:

- (1) declaring that Defendants have violated FOIA by failing to provide all records responsive to Plaintiff's respective FOIA requests;
- (2) ordering that Defendants make all the requested records available to Plaintiff at no cost within twenty days;
- (3) awarding Plaintiff its litigation costs and reasonable attorneys' fees in this action; and
- (4) ordering such other relief as the Court may deem just and proper.

Dated: February 11, 2009
Chicago, IL

Respectfully submitted,

s/ Thomas Cmar
THOMAS CMAR (TC 8791)
ANDREW WETZLER (AW 7322)
Natural Resources Defense Council
2 N. Riverside Plaza, Ste. 2250
Chicago, IL 60606
Phone: (312) 663-9900
Fax: (312) 651-7916
Email: tcmar@nrdc.org

Counsel for Plaintiff